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PROCUREMENT SERVICES DIVISION

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MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600
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R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

January 30, 2008

Michael A. Burk, CPPO
Director of Procurement for Operations
SC Department of Transportation
955 Park Street
Columbia, SC 29201

Re: **WRITTEN DETERMINATION**
IN THE MATTER OF: Bid Withdrawal and Cancellation of Award
Annual Contract for Rip Rap and Crusher Run for the
Clarendon Maintenance Yard
IFB NO.: SB9827
CASE NUMBER: 2007-141

Dear Mr. Burke:

Please find enclosed the Written Determination of the Chief Procurement Officer concerning the cancellation of award, relative to the referenced matter.

The South Carolina Procurement Code, under Section 11-35-4410, subsection (1)(b), states:

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

If you should have any questions, please call me at (803) 737-0635.

Sincerely,

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

cc: Keith McCook, Assistant General Counsel
Alonzo Conyers, Dump Truck Man, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
IN THE MATTER OF:)
BID WITHDRAWAL)
AND CANCELLATION OF AWARD)
)
DEPARTMENT OF TRANSPORTATION)
)
ANNUAL CONTRACT FOR RIP RAP)
AND CRUSHER RUN FOR THE)
CLARENDON MAINTENANCE YARD)
)
DOT IFB NO. SB9827)

BEFORE THE CHIEF PROCUREMENT

DETERMINATION

CASE NO. 2007-141

POSTING DATE:

JANUARY 30, 2008

This matter is before the Chief Procurement Officer pursuant to a request from Dump Truck Man, LLC (DTM) under the provisions SC Code Ann §11-35-1520(7) and SC Regulation 19-445.2085(A) to withdraw its bid on an annual contract for rip rap and crusher run to be delivered to the Clarendon maintenance shop yard of the Department of Transportation (DOT). Because DOT has posted a Notice of Intent to Award a contract to DTM, any decision to allow DTM to withdraw its bid will necessarily require a determination pursuant to Regulation 19-445.2085(C)(8) that cancellation of the award is clearly in the best interest of the State.

CPO FINDINGS

On August 16, 2007, DOT published and invitation for bids (IFB) for an annual contract for rip rap and crusher run to be delivered to the Clarendon maintenance shop yard. The IFB offered bidders the opportunity to bid prices for 500 tons of rip rap and 200 tons of crusher run, crushed granite. The award term offered was one year with an additional four one-year extension options possible.

On September 25, 2007, DOT opened bids and recorded DTM as the low bidder at a price of \$13,500 for the rip rap and \$2,400 for the crusher run.

On September 28, 2007, DOT posted a statement of award to DTM for a total of \$79,500 (\$13,500 + \$2,400 per year x 5 years).

On October 23, 2007, DTM informed DOT, "Dump Truck man, LLC respectfully request that our bid for the above-mentioned proposal be withdrawn. In review of our proposal it was determined that our pricing for the transport of the materials were not included in the pricing. Our bid should have included an additional \$30,000."

DOT asked the CPO to cancel the award after award but prior to performance in accordance with SC. Reg. 19-445.2085(C).

DETERMINATION

After award but before performance, a bidder may only withdraw an inadvertently erroneous bid upon a written determination by the appropriate chief procurement officer (CPO) that under the facts withdrawal is appropriate and that cancellation of award is clearly in the best interest of the State. SC Code Ann § 11-35-1520(7); SC Regulation 19-445.2085(A) and (C)(8).

Section 11-35-1520(7) states in part that:

“withdrawal of inadvertently erroneous bids after award... but before performance, may be permitted in accordance with regulations promulgated by the board. ... Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.”

In accordance with Section 11-35-1520(7), the board adopted Regulation 19-445.2085. Regulation 19-445.2085(A) states that:

“A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder’s or offeror’s mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.”

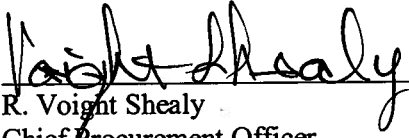
Section 11-35-1520(7) requires a bid to be “inadvertently erroneous” in order to withdraw the bid after award. Inadvertent means “1. Not duly attentive, 2. Accidental; unintentional.” *The American Heritage Dictionary*, Second College Edition (1985). Error means “1. An act, assertion, or belief that unintentionally deviates from what is correct, right, or true... 4. A mistake. *Id.* These two terms describe DTM’s circumstances. In the rush of preparing its bid, DTM offered a unit price for the rip rap and the crusher run absent delivery. DTM wrote an unexplained additional number at the bottom of its bid - \$30,000. Now we know, the \$30,000 represented DTM’s delivery charges for the rip rap and the crusher run, but as DTM acknowledged in its request to withdraw its bid, “the amount was not distributed among the unit prices which should have been \$73.80 per ton for the rip rap (not the unit price bid of \$27.00 per ton) and \$45 per ton for the crusher run (not the unit price bid of \$12.00per ton).” Regulation 19-445.2085(A) further requires the bidder’s error to be one that will cause the bidder “substantial loss.” Here, DTM’s mistake will cost DTM \$30,000 for the first year of the contract alone.

In a bid mistake case, the United States District Court for the District of South Carolina held that “A contract may be rescinded for unilateral mistake... when the mistake is accompanied by circumstances which would make it a great wrong to enforce the agreement and the nonmistaken party may be returned to the *status quo ante*.” National Fire Insurance Company of Hartford v. Brown & Martin, 726 F. Supp 1036, 1039 (D.S.C. 1989), affirmed 907 F.2d 1139 (4th Cir. 1990). While the Court’s holding was based on common law, not statutory and regulatory law, the Court

relied on the fact that the contractor would suffer a substantial loss if it was not allowed to withdraw its bid after award but before performance.¹

In this case, DOT has not detrimentally changed its position in reliance on DTM's bid. Upon withdrawal of the bid and cancellation of the award, DOT will be in the exact same position it was in before posting the Notice of Intent to Award. On the other hand, to require DTM to honor its mistaken bid will cause DTM substantial loss. Under the circumstances, it is appropriate to allow DTM to withdraw its bid.

Cancellation of award pursuant to Regulation 19-445.2085(C)(8) is appropriate when it is legally proper to allow the contractor to withdraw its bid as inadvertently erroneous. The withdrawal essentially renders the award null and void since there is no longer a bid on which to make an award. Moreover, cancellation of award will allow DOT to proceed with award to the next lowest responsive and responsible bidder in a timely manner. For the foregoing reasons, the CPO hereby determines that it is appropriate to allow DTM to withdraw its bid as inadvertently erroneous and to cancel the Notice of Intent to Award a Contract to DTM.


R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

1/30/08
Date

¹ Brown & Martin made a \$68,900 mistake in submitting a low bid of \$588,912.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

Additional information regarding the protest process is available on the internet at the following web site:
www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm



South Carolina
Department of Transportation

955 Park Street, Room 101
Columbia, South Carolina 29201

Director of Procurement
Michael A. Burk, CPPO
(803) 737-1481 • Fax (803) 737-2046

RECEIVED

MMO-BID CONTROL

2007 OCT 29 AM 10 15

October 25, 2007

Voight Shealy
Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Cancellation of Award to Dump Truck Man, LLC for Annual Contract for Rip Rap and
Crusher Run to be Delivered to Claredon Maintenance Shop Yard – SB9827

Dear Mr. Shealy:

SCDOT requests that the award for this procurement be cancelled prior to performance according to 19-445.2085, C (8). The contractor did not include all costs in the unit price but entered a lump sum at the bottom of the response page. This was taken as a total for the bid. Because this amount differed from the total of the unit prices, the unit price was used in accordance with the terms and conditions for the award amount. This additional number was in actuality the contractor's price to deliver the goods. This is a minority vendor who we believe did not comprehend the requirements of the document and did not contact us for clarification or assistance. We believe that the vendor's explanation is valid. We further believe and that it would create a financial hardship that would not be appropriate if we tried to enforce the award.

SCDOT requests that the solicitation be re-awarded to the second low bidder, L. A. Barrier at \$20,570.00 annually. This cost is reasonable and typical for this commodity. This is a potential 5 year contract that allows a CPI/PPI escalation annually if appropriate.

Enclosed are copies of the original bid, bid responses, the bid tabulation, and the original award notice. If I can provide any additional information please advise.

Sincerely,

Michael A. Burk, CPPO
Director of Procurement for Operations

MAB: mab
Enclosures

Dump Truck Man, LLC



4514 Faukland Road
Columbia, SC 29210
Telephone: (803) 237-4047

October 23, 2007

Ms. Donna J. Potts
South Carolina Department of Transportation
Procurement Division
955 Park Street Room 101
Columbia, South Carolina 29201

RE: Bid number SB9827-09/25/2007
Annual contact for rip rap and crusher run to be delivered to Clarendon
Maintenance Shop Yard

Dear Ms. Potts:

Dump Truck Man, LLC respectfully request that our bid for the above-mentioned proposal be withdrawn. In review of our proposal it was determined that our pricing for the transport of the materials were not included in the pricing. Our bid should have included an additional \$30,000; however that amount was not distributed among the unit prices which should have been \$73.80 per ton for the rip rap, and \$45 per ton for crusher run for a total bid price of \$45,900.

We apologize for the oversight as this were our first time submitting a quotation to SCDOT. We appreciate your consideration of allowing us to withdraw our bid.

Thank you very much.

Sincerely,

Alonzo Conyers
Alonzo Conyers